

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA

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In re:

Case No.: 04-31904GFK  
Chapter 7

HOLLI A. ELLERING,

Debtor.

-----X  
CAPITAL ONE BANK,

Plaintiff,

Hon.  
Adv. Pro. No.:  
**COMPLAINT TO DETERMINE  
DISCHARGEABILITY**

- against -

HOLLI A. ELLERING,

Defendant.  
-----X

**COMPLAINT**

Plaintiff, **Capital One Bank** ("Plaintiff"), by its attorneys, complains of the Defendant/Debtor, **Holli A. Ellering** ("Defendant"), and alleges:

**JURISDICTION; VENUE; PARTIES**

1. Plaintiff is a Virginia corporation, having its principal place of business located at 100 East Shore Drive, Glen Allen, Virginia 23059.
2. Defendant is an individual residing at 8805 Brunswick Path, Inver Grove Heights, MN 55076.
3. On March 30th, 2004, Defendant filed a voluntary Chapter 7 bankruptcy petition.
4. This Court has jurisdiction over this proceeding pursuant to 28 U.S.C. §1334, 28 U.S.C. §157 and the Order of Reference entered by the District Court.
5. Venue is proper in this district by virtue of 28 U.S.C. §1409(a), as this proceeding arises in and relates to a case under the Bankruptcy Code that is pending in this district.
6. This is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(I).

### **FACTS**

7. Defendant opened a revolving charge account with Plaintiff, account number: 5291492352971663 (the "account"). Defendant made periodic charges and payments upon the account pursuant to the cardholder agreement governing said account.

8. By using the card, the Defendant made an implied representation to Plaintiff that each time she took cash advances and assessed purchases to her account, she would repay same in accordance with the terms and conditions set forth in the cardholder agreement.

9. Defendant presently owes the Plaintiff the sum of \$8,301.07 upon the account.

10. During the period from September 6th, 2003 to October 28th, 2003, Defendant took seven (7) cash advances totaling \$3,887.95 and made seventy-four (74) purchases totaling \$3,449.08. A listing of the foregoing charges are attached hereto as Exhibit "A".

11. Throughout the foregoing time period and thereafter, Defendant did not remit any payments to Plaintiff for same. Defendant then filed bankruptcy on March 30th, 2004, and at such time, Defendant owed Plaintiff \$8,301.07, including interest accrued up to the date of filing.

### **AS AND FOR A FIRST CAUSE OF ACTION**

12. Plaintiff repeats and realleges each and every allegation contained in paragraphs "1" through "11" of this complaint, with the same force and effect as if fully set forth herein.

13. Pursuant to Bankruptcy Code §523(a)(2)(A), the Defendant fraudulently incurred the debt that is subject to this adversary proceeding, and therefore, said debt must be deemed non-dischargeable.

14. First, at the time of each charge, the Defendant made an implied representation to Plaintiff that she had the intent to repay same in accordance with the cardholder agreement.

15. Second, upon information and belief, the Defendant knew at the time she made the foregoing representations that same were false and were made to induce the Plaintiff to continue to extend credit to Defendant under the cardholder agreement.

16. To exemplify same, the Defendant incurred \$7,337.03 upon her account within the foregoing time period, which consisted of eighty-one (81) charges to said account, and did not remit any payments to Plaintiff for same; incurred multiple charges on the same day; and upon information and belief, the Defendant purchased luxury good(s) and/or service(s); and upon information and belief, the Defendant utilized the cash advances to pay other debts and/or expenses.

17. Third, in light of the foregoing, the Defendant made such representations with the intention and purpose of deceiving Plaintiff into extending and continuing to extend the Defendant's credit line.

18. Fourth, Plaintiff actually and justifiably relied on the Defendant's implied representations as the basis for extending future credit to the Defendant.

19. Fifth, in light of the foregoing, the Plaintiff sustained monetary losses and damages as a proximate result of the Defendant's fraudulent conduct in the amount of \$8,301.07.

20. It is readily apparent that the Defendant was insolvent at the time she incurred the charges subject to this action, and incurred same with a reckless disregard to the belief that she could repay the debt to Plaintiff.

21. Therefore, Defendant had a specific intent to defraud Plaintiff by accepting the benefits of the credit line without ever intending to repay same.

22. By reason of the foregoing, the debt owed to Plaintiff must be deemed non-dischargeable under 11 U.S.C. § 523(a)(2)(A), and therefore, Plaintiff must be entitled to a judgment against the Defendant in the amount of \$8,301.07.

**WHEREFORE**, Plaintiff, Capital One Bank, respectfully requests this Honorable Court for the following relief: 1) On the first cause of action, and pursuant to 11 U.S.C. §523(a)(2)(A), a judgment in the amount of \$8,301.07 against Defendant and a determination that said debt is nondischargeable, together with costs, disbursements and reasonable attorneys' fees; and 2) such other, further and different relief as the Court may deem just and proper.

Dated: Woodbury, New York  
June 24, 2004

**STEINBERG, FINEO, BERGER, & FISCHOFF, P.C.**  
Attorneys for Plaintiff

By: /s/ Heath S. Berger, Esq. (HSB #7802)  
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Woodbury, New York 11797  
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**I hereby certify that I am admitted to the Bar of the United States District Court for the DISTRICT OF MINNESOTA, and I am in compliance with the additional qualifications to practice in this court as set forth in the Local Rules.**

Local Counsel:

By: /s/ Joseph A. Skokan, Esq.  
1675 South Greeley St.; #100  
Stillwater, MN 55082  
Telephone: (651) 351-1975  
Facsimile: (651) 351-3975

National\forms\complaint  
File No.[M050304/075]

# **Exhibit A**

INVOICE#	DATE	AMOUNT	DESCRIPTION	
M050304/075	10/28/03	9.30	GM TOBACCO	MINNEA
M050304/075	10/28/03	21.83	RAINBOW 1-8844	SJL MINNEA
M050304/075	10/27/03	13.81	HANCOCK FABRICS 6037	W SAIN
M050304/075	10/27/03	9.86	HOLIDAY STATIONSTORE	INVER
M050304/075	10/25/03	14.33	STOP N SHOP #7	MINNEA
M050304/075	10/23/03	5.86	SPEEDWAY 4516	MENDOT
M050304/075	10/23/03	13.08	HOLIDAY STATIONSTORE	EAGAN
M050304/075	10/22/03	18.72	MR MOVIES #5	INVER
M050304/075	10/22/03	34.01	COMCAST DIGITAL PHONE	SAINT
M050304/075	10/21/03	8.00	OLD COLONY EZ 13010046	MINNEA
M050304/075	10/19/03	3.50	SUPERAMERICA 4160	BROOKL
M050304/075	10/19/03	16.80	SUPERAMERICA 4160	BROOKL
M050304/075	10/19/03	45.99	TARGET 00010959	MINNEA
M050304/075	10/18/03	14.26	TARGET 00000521	MINNEA
M050304/075	10/16/03	50.37	RAINBOW 1-8876	SJL INVER
M050304/075	10/13/03	18.54	RAINBOW 1-8876	SJL INVER
M050304/075	10/10/03	26.85	GAS-PLUS 1	MINNEA
M050304/075	10/09/03	11.81	HOLIDAY STATIONSTORE	MINNEA
M050304/075	10/08/03	10.01	HOLIDAY STATIONSTORE	INVER
M050304/075	10/07/03	14.22	RAINBOW 1-8876	SJL INVER
M050304/075	10/06/03	53.50	WALGREEN 00041194	MINNEA
M050304/075	10/06/03	4.54	WALGREEN 00041194	MINNEA
M050304/075	10/05/03	61.50	U.S. BANK/US BANK LAKE	MINNEA
M050304/075	10/05/03	21.50	U.S. BANK/US BANK LAKE	MINNEA
M050304/075	10/04/03	201.50	U.S. BANK/HOLIDAY ARBO	INVER
M050304/075	10/04/03	139.48	WWW*EARTHLINK.NET	800-71
M050304/075	10/04/03	101.50	U.S. BANK/HOLIDAY ARBO	INVER
M050304/075	10/03/03	7.44	PAPA JOHN'S # 00410183	INVER
M050304/075	10/03/03	21.26	RAINBOW 1-8876	SJL INVER
M050304/075	10/03/03	20.80	SPEEDWAY 4516	MENDOT
M050304/075	10/02/03	155.21	NCO UTILITY BILL PMT	800-79
M050304/075	10/02/03	11.07	RAINBOW 1-8876	SJL INVER
M050304/075	10/01/03	54.87	TARGET 00000521	MINNEA
M050304/075	10/01/03	22.44	SPEEDWAY 4516	MENDOT
M050304/075	09/30/03	99.48	CASH-N-PAWN #406	952-52
M050304/075	09/30/03	195.00	CASH-N-PAWN #406	952-52
M050304/075	09/30/03	7.40	USPS 2663650540	INVER
M050304/075	09/29/03	20.04	SNYDER DRUG #5041	INVER
M050304/075	09/29/03	16.86	AMOCO OIL 01674829	MINNEA
M050304/075	09/29/03	5.80	STOP N SHOP #7	MINNEA
M050304/075	09/28/03	14.03	NEWPORT DRUG	NEWPOR
M050304/075	09/27/03	25.65	HOLIDAY STATIONSTORE	INVER
M050304/075	09/27/03	8.68	RAINBOW 1-8876	SJL INVER
M050304/075	09/26/03	21.26	WALGREEN 00041194	MINNEA
M050304/075	09/25/03	5.17	CUB FOODS - LAK S5C	MINNEA
M050304/075	09/25/03	24.70	THE STAR TRIBUNE-CIRCU	612-67
M050304/075	09/24/03	14.82	WALGREEN 00041194	MINNEA
M050304/075	09/23/03	74.50	AVLIMIL	866-83
M050304/075	09/22/03	15.82	AMOCO OIL 01836212	NEWPOR
M050304/075	09/21/03	46.26	TARGET 00000521	MINNEA
M050304/075	09/21/03	16.18	RAINBOW 1-8876	SJL INVER
M050304/075	09/21/03	12.15	HOLIDAY STATIONSTORE	INVER

INVOICE#	DATE	AMOUNT	DESCRIPTION	
M050304/075	09/18/03	21.80	SPEEDWAY 4516	MENDOT
M050304/075	09/17/03	37.31	TARGET	00000521 MINNEA
M050304/075	09/17/03	444.46	LAKE STREET TIRE CENTE	MINNEA
M050304/075	09/16/03	400.00	CASH WELLS FARGO C/A #	MINNEA
M050304/075	09/16/03	101.95	09999990001636/7920 FR	BLOOMI
M050304/075	09/15/03	156.25	NCO UTILITY BILL PMT	800-79
M050304/075	09/15/03	111.50	STEVEN J BENKE DDS	INVER
M050304/075	09/15/03	28.57	HOLIDAY STATIONSTORE	EAGAN
M050304/075	09/15/03	25.50	WALGREEN	00048827 INVER
M050304/075	09/15/03	14.11	HOLIDAY STATIONSTORE	INVER
M050304/075	09/14/03	54.60	TARGET	00000091 SAINT
M050304/075	09/14/03	37.12	COMCAST DIGITAL PHONE	SAINT
M050304/075	09/14/03	24.60	RAINBOW 1-8876	SJL INVER
M050304/075	09/13/03	71.57	TARGET	00000521 MINNEA
M050304/075	09/12/03	9.31	RAINBOW 1-8876	SJL INVER
M050304/075	09/12/03	535.35	TIRE PLUS	83780023 WEST S
M050304/075	09/12/03	12.31	HOLIDAY STATIONSTORE	INVER
M050304/075	09/12/03	17.32	CUB FOODS	S5C WEST S
M050304/075	09/12/03	24.09	HOLIDAY STATIONSTORE	INVER
M050304/075	09/11/03	29.82	BATH & BODY WORKS 0400	WOODB
M050304/075	09/11/03	16.51	TARGET	00000521 MINNEA
M050304/075	09/10/03	3000.00	PURCHASE CHECK	
M050304/075	09/09/03	65.69	TARGET	00000091 SAINT
M050304/075	09/09/03	22.34	SUPERAMERICA 4548	INNER
M050304/075	09/08/03	50.46	TARGET	00000521 MINNEA
M050304/075	09/08/03	50.00	ICC	MINNEA
M050304/075	09/07/03	27.67	HOLIDAY STATIONSTORE	INVER
M050304/075	09/06/03	77.84	TARGET	00000521 MINNEA
M050304/075	09/06/03	7.42	HOLIDAY STATIONSTORE	EAGAN